

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD D. GLOVER,

Defendant-Appellant.

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UNPUBLISHED

December 11, 2003

No. 242371

Wayne Circuit Court

LC No. 01-008680

Before: Cavanagh, P.J., and Jansen and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a bench trial for armed robbery, MCL 750.529; carjacking, MCL 750.529a; and felony-firearm, MCL 750.227b. We affirm. This case arose when defendant followed a minister and his assistant into a church and then robbed them at gunpoint. Defendant took their wallets, keys, and other personal items. Defendant then drove off with the minister’s car. The prosecutor originally brought two counts of armed robbery against defendant: one for each man he robbed. The trial court dismissed the count regarding the assistant without prejudice because the assistant failed to appear at trial and the prosecutor failed to show due diligence in producing him.

Defendant first argues that the trial court erred when it dismissed the second armed robbery count without prejudice rather than with prejudice. On appeal, the prosecution concedes that the trial court erroneously dismissed the case without prejudice, but requests that we reinstate the charge and remand for a decision on the merits rather than remanding for dismissal with prejudice. We note that the prosecutor did not object to the trial court dismissing the count for lack of evidence and does not separately argue here that the trial court erred when it dismissed the count, so we will not reverse the unchallenged dismissal. Nor will we alter the dismissal. The prosecutor as much as admits that the dismissal, as it stands, amounts to an acquittal, *People v Mehall*, 454 Mich 1, 5-6; 557 NW2d 110 (1997), so defendant does not face any real danger of the prosecutor bringing new charges.

Defendant next argues that the trial court erred when it allowed testimony regarding a separate kidnapping charge into evidence. We disagree. We review for abuse of discretion a trial court’s decision regarding evidentiary issues. *People v Crawford*, 458 Mich 376, 383; 582 NW 2d 785 (1998). An evidentiary ruling will not amount to error unless it adversely affects a substantial right of a party. MRE 103.

On the first day of trial, defense counsel voir dired defendant on the record regarding defendant's refusal of a combined plea offer involving this case and the kidnapping case. Therefore, the judge was already aware of the nature of the other criminal action and its pendency. At the bench trial, defense counsel attempted to introduce evidence through an officer that defendant's sister lied to the police about defendant's involvement in this case to get revenge for his alleged participation in the kidnapping of a child in her care. At that point in the trial, defense counsel stated, "Now we all know there's a second case pending against my client, and it arises out of a complaint filed by his sister . . . ."

Later in the trial, defendant's other sister and alibi witness testified that she delayed exculpating defendant with the police because she was preoccupied with her concern about the allegedly kidnapped nephew. The questions that followed and drew defendant's objections represented an attempt to clarify the distinction between the present charges and the pending kidnapping charges, and determine the witness's credibility and relationship to all the charges. Defendant freely offered the information regarding the kidnapping charge and its factual basis when he later testified. Therefore, defendant initiated the inquiry into the relationship between charges and openly divulged their factual basis, and the trial court did not abuse its discretion when it allowed some clarification and distinction between defendant's kidnapping charges and those at issue.

Next, defendant argues that the trial court erred when it allowed the prosecution to call rebuttal witnesses that already testified in the prosecution's case in chief. Defendant argues that the repetition constituted improper witness rehabilitation requiring reversal. We disagree. The defense opposed the minister's identification of defendant with evidence that the minister initially provided the police with a description that did not fit defendant. Defendant also proffered evidence that another man nicknamed "Dirty" committed the robbery. Defendant elicited testimony that defendant's sister informed the police of defendant's involvement in the crime and she vengefully implicated defendant despite her knowledge of Dirty's guilt.

On rebuttal, the prosecutor recalled the minister to clarify the discrepancy in his description of defendant and restate his certainty that defendant committed the crime. The prosecutor also called the officer in charge to explain that the police had information linking defendant to the crime before the kidnapping, so the charges did not originate from his sister's spite. Rebuttal testimony is properly submitted when it fairly meets new evidence admitted by the opposing party during the party's case in chief. *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996). In this case, the rebuttal testimony directly opposed new evidence and did not simply rehash evidence from the prosecutor's case in chief or introduce an entirely new avenue for proving defendant's guilt. Therefore, the rebuttal evidence was proper. *Id.*

In his Standard 11 brief, defendant also argues that the trial court erred when it found him guilty of carjacking despite a lack of evidence that the minister was "in the presence" of his car as MCL 750.529a requires. As defendant concedes, however, our decision in *People v Raper*, 222 Mich App 475, 482-483; 563 NW2d 709 (1997), controls this issue and provides that a car is within a victim's presence if the victim had control over the car, specifically its keys, and the control was relinquished only because of violence or fear. Here, the evidence clearly indicated that the minister relinquished his car keys to defendant because defendant demanded them at gunpoint. Accordingly, the trial court did not err when it found defendant guilty of carjacking despite evidence that the minister was inside the church and his car was parked outside.

Defendant next argues that his trial counsel provided ineffective assistance by failing to request suppression of his identification in a pretrial lineup. Defendant attacks the identification by arguing the invalidity of his arrest, the lack of legal counsel at the lineup, and the lineup's suggestiveness. Defendant's principal argument for the illegality of his arrest rests on the fact that police received information tying him to the robbery a month before they entered his house and arrested him without a warrant. But defendant admits that his sister reported the alleged kidnapping of his nephew the day before his arrest. Defendant also presented evidence that he ran into his house when he saw the police pull up. Given these facts, the trial court would likely have found that probable cause existed and the police were excused from the warrant requirement by the "hot pursuit" exception. *People v Cartwright*, 454 Mich 550, 558-559; 563 NW2d 208 (1997). Even assuming arguendo that the trial court found that the arrest was illegal, it does not follow that evidence of the lineup would be considered "fruit" of the illegal arrest's "poisonous tree." *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). Under these circumstances defense counsel wisely refrained from opening up the issue of defendant's arrest and releasing all the prejudicial information that linked him to the kidnapping case.

Defendant also asserts that he lacked legal counsel at the lineup, rendering it a violation of his right to due process. Defendant argues that his trial counsel's failure to argue the issue was an egregious error amounting to ineffective assistance. Because defendant failed to present to the trial court his factual basis for this argument according to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), we are limited to review of the record alone. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). In this case, the record does not disclose any lack of representation at the lineup or the failure of police to receive a knowing waiver of counsel from defendant before performing the lineup. Therefore, the record fails to provide factual support for defendant's argument that his trial counsel provided him with ineffective assistance.

Defendant next argues that the prosecutor intentionally destroyed exculpatory evidence. Defendant argues that police found a pistol at his house during his arrest and failed to produce it at trial. Defense counsel raised the issue of the absent pistol at trial, but did not elicit any evidence that the gun was destroyed rather than collected and placed into safekeeping. The one officer who testified about the gun merely stated that he did not personally check the gun into evidence. He also freely admitted that the pistol did not appear functional and was "garbage." But the crimes at issue only require that a defendant possess a firearm, whether operable or not. MCL 750.529; *People v Thompson*, 189 Mich App 85, 86; 472 NW2d 11 (1991). Therefore, any pistol in defendant's possession would only incriminate him further. At best, the pistol would not link defendant more closely to the robbery, and defendant would be in only a slightly worse position than if he never raised the issue. Therefore, defendant has failed to substantiate his allegation of prosecutorial misconduct.

Finally, defendant argues that his pre-sentence investigation report contains erroneous information and the prosecutor concedes the argument. Therefore, we remand for the ministerial task of striking from defendant's pre-sentence investigation report the challenged, unconfirmed, and unused allegations of a prior arrest.

Affirmed, but remanded for the ministerial task of redacting the allegations of a previous arrest from the pre-sentence investigation report.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Peter D. O'Connell